STATE OF MICHIGAN

COURT OF APPEALS

LUCY M. PILCH,

Plaintiff-Appellant,

v

OCWEN FEDERAL BANK and SALOMON BROTHERS REALTY CORPORATION,

Defendants-Appellees.

UNPUBLISHED
June 13, 2006

No. 259445
Ingham Circuit Court
LC No. 01-093721-CH

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right from a final judgment entered against defendants. On appeal, however, plaintiff challenges the trial court's earlier order granting defendant Ocwen Federal Bank (Ocwen) relief from a default judgment. Plaintiff also challenges the trial court's directed verdict for defendants on plaintiff's claim for attorney fees under the Michigan Consumer Protection Act (MCPA), as well as the trial court's order denying plaintiff's motion for a new trial on damages. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff first argues that the trial court abused it discretion in granting Ocwen relief from a default and default judgment. The trial court set aside the default and default judgment because of Ocwen's prior counsel's medical condition, but plaintiff argues the late filing was due to Ocwen's former counsel acting negligently and dilatorily. We review a trial court's decision on a motion to set aside a default judgment for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). An abuse of discretion occurs only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000). While it is unclear what court rule the trial court relied on in granting Ocwen relief,[1]

[1] In its cursory opinion and order, the trial court cited no court rule, but did indicate defendant had established "good cause", which is part of the standard under MCR 2.603(D). *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

Ocwen sought to set aside the default and default judgment under MCR 2.612(C)(1)(a) and (f). Those rules provide a party with relief from judgment for the following reasons:

> (a) Mistake, inadvertence, surprise, or excusable neglect[;]
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> ***
>
> (f) Any other reason justifying relief from the operation of the judgment.

Here, the trial court reviewed the affidavits of two medical professionals, both of whom diagnosed Ocwen's former counsel with numerous medical conditions and concluded that her medical condition affected her judgment and her ability to adequately represent her clients during the relevant time period. Given the circumstances, we do not find that the trial court abused its discretion because of the unique and extraordinary situation Ocwen's former counsel was experiencing at the time the default occurred.

Plaintiff next argues that the trial court erred in granting defendants' motion for a directed verdict regarding attorney fees because, contrary to the trial court's ruling, she did not have to submit evidence of reasonable attorney fees because such fees were available as costs under the MCPA, specifically, MCL 445.911(2). We agree. This Court reviews de novo a trial court's decision to grant a directed verdict. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). Further, issues of statutory construction present questions of law that this Court also reviews de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003). The primary goal of statutory interpretation is to effectuate the intent of the Legislature, which is accomplished by examining the plain language of the statute. *Id.* at 526-527. If the statutory language is unambiguous, appellate courts presume that the Legislature intended the plain meaning expressed, and further judicial construction is neither permitted nor required. *Id.* at 527.

Pursuant to MCR 2.625, a prevailing party is generally entitled to recover certain litigation costs. *LaVene v Winnebago Industries*, 266 Mich App 470, 477; 702 NW2d 652 (2005). MCL 600.2405(6) provides, in relevant part, "The following items may be taxed and awarded as costs unless otherwise directed: . . . Any attorney fees authorized by statute or by court rule." Under the MCPA, attorney fees are authorized by MCL 445.911(2), which provides, "Except in a class action, a person who suffers loss as a result of a violation of this act may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees." So, pursuant to MCL 600.2405(6), attorney fees under the MCPA may be awarded as costs to a prevailing party. Obviously, the party to be awarded costs as a prevailing party is unknown until after a verdict or other resolution of the substantive claims in a case. Therefore, the award of such attorney fees was not a matter to be resolved at trial and, accordingly, was not a proper matter for a directed verdict motion.[2]

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[2] We note that the rule that a party must submit evidence of a contractually based claim for attorney fees to avoid a directed verdict, *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219

(continued…)

Plaintiff's final argument is that the trial court should have granted a new trial because of newly-discovered evidence that the city of Lansing was proceeding with demolition. We disagree. We review a trial court's decision on a motion for a new trial for an abuse of discretion, *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001), but we review de novo any questions of law that may arise. *Id.*

To obtain a new trial based on newly discovered evidence, the moving party must show the following: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have produced the evidence at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A motion for a new trial based on newly discovered evidence is disfavored. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). We conclude the evidence of demolition of plaintiff's house is not newly discovered because she was aware at the time of trial of the city's notice that the house would be demolished if it was not repaired. Thus, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray

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Mich App 190, 196; 555 NW2d 733 (1996), is inapplicable because plaintiff's entitlement to attorney fees is statutory.